No. 94-1427

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and ROBERT A. BUTTERWORTH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument: Reply Reasons Why the Writ Should Be Granted 1

I. The pervasive discord and confusion, concerning the use of the *O'Brien* and/or *FW/PBS* test to judge the constitutionality of laws regulating establishments displaying nudity, is manifest by Respondent's brief in opposition to the petition for writ of certiorari. 1

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Ambassador Books & Video, Inc. v. Little Rock, Ark., 20 F.3d 858 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 186 (1994) 3, 6

Barnes v. Glen Theater, Inc., 501 U.S. __, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1994) 1, 3

DG Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1992) 3, 6

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 100 S. Ct. 596, 107 L. Ed. 2d 215 (1990) ..... *passim*

Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993), *cert denied*, __ U.S. __, 115 S. Ct. 59 (1994) 6

Contents

Page

ILO Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578 (1994) 3, 6

Lakeland Lounge v. City of Jackson, Miss., 973 F.2d 1255 (5th Cir. 1992) 3

Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123 (3d Cir. 1993) 3

11126 Baltimore Blvd. v. Prince George's County, Md., 32 F.3d 109 (4th Cir. 1994) 6

Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994) 4, 6

TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994) 6

Triplette Grille, Inc. v. Akron, Oh., 40 F.3d 129 (6th Cir. 1994) 3

United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 673, 20 L. Ed. 2d 672 (1988) ..... *passim*

United States Constitution Cited:

First Amendment 3, 6

Fourteenth Amendment 3

ARGUMENT: REPLY REASONS WHY THE WRIT SHOULD BE GRANTED:

I.

THE PERVASIVE DISCORD AND CONFUSION, CONCERNING THE USE OF THE *O'BRIEN*[1] AND/OR *FW/PBS*[2] TEST TO JUDGE THE CONSTITUTIONALITY OF LAWS REGULATING ESTABLISHMENTS DISPLAYING NUDITY, IS MANIFEST BY RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To claim that satisfaction of the *O'Brien* fourfold test (which was approved in *Barnes v. Glen Theater, Inc.*, 501 U.S. __, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1994)) is irrelevant to the case at hand,[3] confirms the confusion and uncertainty concerning the use of that analysis for legislation affecting conduct which involves the display of nudity; and it is inconsistent with Respondent's own position, that both the *O'Brien* and the *FW/PBS* tests should be used to evaluate the constitutionality of an ordinance regulating adult entertainment.

> The Respondent herein does not suggest that Citrus County cannot regulate the activity at issue herein. What he does emphatically submit is that such regulation must first satisfy the *O'Brien* test to justify its very

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1. *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 673, 20 L. Ed. 2d 672 (1988).

2. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 100 S. Ct. 596, 107 L. Ed. 2d 215 (1990).

3. Brief in Opposition, at 16.

> existence.[4] Once this is accomplished, then an appropriate analysis must be undertaken to find that the regulation of expressive activity is governed by the adequate procedural safeguards set forth in FW/PBS v. City of Dallas. The circuit court appropriately undertook this sequence in evaluating the instant case and none of the arguments suggested by the Petitioner, confusing though they may be, in any way justify [sic] the relief requested from this Court.[5]

This suggests that both tests, *O'Brien* and *FW/PBS*, should be used to evaluate the constitutionality of an ordinance regulating adult entertainment. Language, that the *O'Brien* and *FW/PBS* tests "set forth the appropriate sequence of evaluation to determine the constitutionality of ordinances similar to the one at issue herein," again suggests that both tests must be used.[6]

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4. Respondent argues that application of the *O'Brien* test

> [I]n no way conflicts with the additional evaluation that, if legislation ultimately passes the O'Brien test and requires the acquisition of a license or permit prior to engaging in First Amendment protected expressive activities, the procedures set forth for obtaining such a license or permit must contain adequate safeguards . . . [I]n no way are these tests at odds, and there is no legitimate basis to suggest that there has been any conflict or inconsistency precipitated by their application.

Id., at 20.

5. *Id.*, at 16.

6. *Id.*, at 23.

That was not the analytic framework used by the court of appeals in the case at hand, and it is not how many other lower, federal courts have analyzed the constitutionality of such ordinances.[7] This evidences the confusion, discord, and inconsistencies in analyzing the constitutional issues inherent in such ordinances and statutes.

That the Court's decision in *Barnes* allowed for the "barest minimum" of First and Fourteenth Amendment protection for nude dancing "under some circumstances" is not in question. *Barnes v. Glen Theater, Inc.*, 501 U.S. at __, 111 S. Ct. at 2460. More importantly, this Court allowed for the regulation and prohibition of public nudity, while permitting dance, as a form of expression, to continue.

The statement that "[Petitioner's] position conflicts with a long line of this Court's decisions which hold that laws requiring a license to engage in First Amendment activity must be subjected to much more exacting scrutiny than those which license non-expressive conduct," is wide of the goal. In *Barnes*, as in the case at hand, the governmental authority sought to

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7. *See Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 128, 130 n.7 (3d Cir. 1993) (licensing ordinance evaluated under *O'Brien* test); *DG Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 143 (4th Cir. 1992) (ordinance prohibiting public nudity evaluated under *O'Brien* test); *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255, 1257-60 (5th Cir. 1992) (zoning-permitting ordinance analyzed under *O'Brien/Renton* test); *Triplette Grille, Inc. v. Akron, Oh.*, 40 F.3d 129 (6th Cir. 1994) (ordinance prohibiting all public nudity analyzed under *O'Brien/Renton* test); *Ambassador Books & Video, Inc. v. Little Rock, Ark.*, 20 F.3d 858, 863 (8th Cir.) (zoning ordinance evaluated by *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 186 (1994); *ILO Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.) (zoning ordinance analyzed under *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 578 (1994).

regulate solely the conduct (nudity) and not the expression (dance) which Respondent claims would be deserving of "more exacting scrutiny."[8]

Respondent concedes that the *O'Brien* test should be used to evaluate legislation affecting non-expressive conduct that is combined with an element of expression.[9] That was exactly the factual setting in the case at hand. Citrus County, Florida sought to regulate the conduct (nudity), while allowing for the "expressive element" (dancing).

Respondent also acknowledges that, in the case at hand the court of appeals disregarded the *O'Brien* test, in the belief that this Court's most recent decisions favored analyzing the ordinance's constitutionality under the *FW/PBS* test.

> The instant case is more analogous to another Supreme Court case, *FW/PBS, Inc. v. City of Dallas,* 493, U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). *FW/PBS* is the Supreme Court's most recent pronouncement on the prior restraint of nude dancing. Because it dealt with a licensing scheme similar to the Citrus County Ordinance, it provides us with valuable insight.

Redner v. Dean, 29 F.3d 1495, 1499-1500 (11th Cir. 1994).[10]

But the endeavor to discount the differences between

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8. Brief in Opposition, at 14.

9. *Id.*, at 19.

10. *Id.*, at 15.

O'Brien and *FW/PBS* tests — "there may be some nebulous variation amongst the tests used," but "the outcomes of those determinations would be the same regardless of which tests are used"[11] — is inconsistent with Respondent's apparent, current position that both analytic tests should be used.

It is also intellectually inconceivable. To suggest that a court may apply either one of these two tests to determine the constitutionality of an ordinance regulating adult entertainment, because the end result would necessarily be the same, would eliminate any need for an appropriate sequence of evaluation."[12]

As a practical matter, it also fails to reckon with the very different outcome of constitutional attacks on legislation regulating conduct, when the *O'Brien* test is employed, than under the *FW/PBS* analysis. The outcome of this very case (like that in the decisions from an abundance of other courts of appeals) depends on the Court's use of either the *O'Brien* or the *FW/PBS* test.

This inconsistency in Respondent's analysis exhibits the exact problem which needs to be resolved by this Court — which test (*O'Brien, FW/PBS,* or both) should be used when embarking on a constitutional analysis of legislation governing the display of nudity in adult entertainment businesses.

If the lower court should have employed the *O'Brien* test to judge the constitutionality of the ordinance's restrictions (as have some of the lower federal courts), it did not; and instead it applied the *FW/PBS* test. Direction is needed from this Court regarding the correct test to employ in analyzing the constitutional validity of this kind of legislation.

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11. *Id.*, at 21.

12. *Id.*, at 23.

Respondent acknowledges[13] that some courts[14] have omitted any use of the *FW/PBS* test, and employed the *O'Brien* test, in evaluating the constitutionality of such legislation; while other courts[15] have used the *FW/PBS* test. He fails to offer any explanation why one test would be appropriate in some cases, and another test appropriate for other cases.

> The O'Brien test, as enumerated in Barnes is used to determine whether or not a time, place, and manner regulation is content neutral, designed to serve a substantial governmental interest, and not unreasonable limiting alternative avenues of communication. The FW/PBS test determines whether or not such regulation contains adequate procedural safeguards.[16]

If he now contends that different constitutionality analyses are to be used for zoning legislation, and for licensing-permitting legislation; Respondent immediately encounters problems with that stance: (1) it conflicts with his long-expressed position that the constitutional validity of adult-entertainment legislation is judged by the same first amendment standard, regardless of

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13. *Id.*, at 22.

14. *See DG Restaurant Corp. v. City of Myrtle Beach, supra; Holmberg v. City of Ramsey, supra; Ambassador Book & Video v. Little Rock, Ark., supra; ILO Investments, Inc. v. City of Rochester, supra.*

15. *See 11126 Baltimore Blvd. v. Prince George's County, Md., supra, TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994); *Redner v. Dean, supra.*

16. Brief in Opposition, at 26.

whether that legislation utilizes zoning requirements, licensing-permitting requirements, or both; (2) it fails to account for judging the constitutionality of legislation that contains both zoning and licensing-permitting conditions; and (3) it is inconsistent with the sequential use-of-both-tests argument that Respondent now advocates before this Court.

Simply reciting the elements (albeit only three of the four) of the *O'Brien* test supplies nothing in the way of explanation about why it has been used by some courts in some cases, but the *FW/PBS* test used by other courts in other cases. The confusion stems not from the elements of these two tests, used in varying circumstances, by different courts, to determine the constitutionality of adult-entertainment legislation. It is manifest in the inconsistencies and discord amongst those courts' decisions, concerning which test to apply, and when to apply it. The bottom line is that the *O'Brien* test alone has been used by several courts in upholding the constitutionality of adult-entertainment licensing ordinances; but here the court of appeals ignored that analysis.

CONCLUSION

The thorny problem of analyzing legislation that regulates — or, in some cases, forbids — conduct that is coupled with an element of expressive behavior, will not fade away. Neither will the problem be helped by leaving the divergence of analyses used by courts to decide the constitutional validity of this kind of legislation.

What is needed is what only this Court can provide: a decisive and definitive voice that declares the analytic test(s) to use, and when and how to employ each, when confronted with a constitutional attack on this kind of legislation. Until that guidance is provided by this Court, the disarray amongst the lower courts is sure to continue and to confound the stability that a sure constitutional analysis will afford legislative bodies at every level.

A writ of certiorari is needed, and requested, to do just that.

Respectfully submitted,

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